

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

RECEIVED
OCT 30 1995
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In re Applications of)	MM DOCKET NO. 93-134
)	
THE PETROLEUM V. NASBY CORPORATION)	File No. BRH-890601VB
)	
For renewal of Station WSWR(FM))	
Shelby, OH)	
)	
THE PETROLEUM V. NASBY CORPORATION)	File No. BTCH-921019HX
)	File No. BTCH-921019HY
For transfer of control of Station)	
WSWR(FM), Shelby, OH)	

TO: The Honorable Edward J. Luton
Administrative Law Judge

DOCKET FILE COPY ORIGINAL

**OPPOSITION OF THE PETROLEUM V. NASBY CORPORATION
TO APPLICATION FOR REVIEW**

Pursuant to §§ 1.4, 1.104 and 1.115 of the Commission's Rules, The Petroleum V. Nasby Corporation (Nasby) through counsel hereby opposes the application for review filed by the Chief, Mass Media Bureau (Bureau) of the Federal Communications Commission (FCC or Commission) on July 5, 1995 in the above-referenced proceeding.¹

1. In its Application for Review, the Bureau urges that notwithstanding the decisions of the Honorable Edward Luton, the

¹ Nasby filed a petition for reconsideration of the Board's June 5, 1995 *Decision* (10 FCC Rcd. 6029), with the Review Board on July 5, 1995. Pursuant to § 1.104(c) of the Commission's Rules, action on the Bureau's July 5, 1995 application for review was withheld pending final action by the Review Board on Nasby's petition for reconsideration. On September 13, 1995, the Review Board released its *Memorandum Opinion and Order* (FCC 95R-17), modifying in part its prior *Decision*. Pursuant to § 1.104(d) of the Commission's Rules, Nasby filed its own Application for Review of the decisions of the Board on October 13, 1995. To the undersigned counsel's knowledge, the Bureau did not withdraw or amend its application for review previously filed on July 5, 1995, and therefore the Bureau has not appealed the Review Board's *Memorandum Opinion and Order*, modifying in part its prior *Decision*. An opposition to the Bureau's application for review is due on this date. See §§ 1.4, 1.104 and 1.115(d) of the Commission's Rules.

No. of Copies rec'd _____
List ABCDE _____

presiding administrative law judge (presiding ALJ) and the Review Board, both granting renewal of Nasby's license, Nasby should be disqualified as a licensee. The Bureau advocates this position even where the record evidence reflects the lack of involvement of Thomas L. Root (Root) in the day-to-day management and operation of Nasby and Station WSWR, and the stipulations it reached with Nasby which conclusively state that Nasby and its principals other than its former principal Root had no involvement with the underlying matters for which Root was adjudged guilty.

2. To reach its conclusions, the Bureau's application for review distorts the record evidence. First, as it has in the past, the Bureau continues to purposely ignore the record evidence of this case as well as relevant Commission precedent in order to reach its desired result. Indeed one could ponder why a hearing was even necessary in light of the Bureau's apparent desire to extract some form of retribution from Nasby where it apparently was unsuccessful in extracting such retribution directly from Root. Whatever the Bureau's motivations, it is absolutely impermissible for those motivations to permeate this proceeding as reflected by the Bureau's position that Nasby should be disqualified notwithstanding the record evidence and Commission precedent.²

² As previously noted, Nasby petitioned for reconsideration of the Board's *Decision*, which the Bureau opposed on procedural grounds. Opposition of Mass Media Bureau to Petition for Reconsideration and/or Clarification filed July 19, 1995. In its reply to that opposition, Nasby pointed out the erroneous procedural arguments of the Bureau, and the fact that absolutely no substantive arguments to the petition were advanced. Reply to Opposition of the Mass Media Bureau to Petition for Reconsideration and/or Clarification. It's not surprising that the Bureau did not

3. The Bureau's quest to reach its desired conclusion that Nasby should be disqualified can be summarized as follows: Root was involved in activities involving FCC licensing proceedings during a time period when he was a principal of Nasby, which certain of the activities were found at a later time period, subsequent to Root's withdrawal from Nasby, to consist of misconduct for which Root was adjudged guilty and incarcerated in

advance any substantive arguments since the Bureau did not seriously challenge nor appeal the record evidence and the presiding ALJ's *Initial Decision* relative to the transfer of control issue. What is shocking though not surprising is the Bureau's attempt to "glom on" to the stock sale aspect of the Review Board's *Decision* as interpreted by the Bureau in order to now argue that the stock transfers somehow impact on Nasby's propensity for truthfulness. See, e.g., ¶ 6, p. 5 of the Bureau's Application for Review. In the past, the Bureau has argued that Nasby's propensity for truthfulness has been placed in doubt by the former presence of Thomas L. Root as a principal of Nasby. This argument got the Bureau nowhere in its quest -- hence the new twist. The bottom line is that throughout this proceeding the Bureau has not sought to reveal the "truth." Rather it has called for the nonrenewal of the Nasby license -- without regard to the record evidence and the decisions of the presiding ALJ and Review Board granting a full renewal. The Bureau's continued appeal of the renewal of Nasby's license where there is no record support runs counter to the Court of Appeals admonition "that government lawyers have the 'responsibility to seek justice' and 'should refrain from instituting or continuing litigation that is obviously unfair.'" *Freeport-McMoran Oil & Gas Company v. FERC*, 962 F.2d 45, 47 (D.C. Cir. 1992). Once again, the Bureau had an opportunity to provide any information which would cast doubt on Nasby's license renewal. Instead it sat back, content with its position that Thomas L. Root's criminal convictions alone should automatically disqualify Nasby notwithstanding the existence of other record evidence supporting the full renewal. The Bureau itself drafted the *Hearing Designation Order* in this proceeding for the Commission's adoption, which by its very terms, and by fundamental fairness and due process afforded by the *Administrative Procedures Act, as amended*, made clear that a full hearing on the issues would take place. Knowing that from the outset and failing to pursue its procedural rights in both the pre-hearing and hearing phases of this proceeding, phases long since passed, the Bureau must be ignored when it argues that Thomas L. Root's criminal convictions alone require the nonrenewal of Nasby's license.

a federal prison. The activities involved misconduct related to FCC licensing proceedings where Root served as legal counsel to various applicants for new FM stations formed by Sonrise Management Services, Inc. (Sonrise) and since Root had been a principal of Nasby at an earlier time, his actions, according to the Bureau, must arbitrarily be imputed to Nasby even though it is undisputed that Nasby had no involvement in Root's law practice nor was otherwise knowledgeable of Root's activities which took place some 400 miles away and did not involve the day-to-day management, operation or control of Nasby and Station WSWR. In order to sidestep the record evidence including stipulations by the Bureau that Nasby had no connection with Root's individual actions which resulted in his convictions, the Bureau attempts to rely on Review Board decisions which in the Bureau's view prohibit the separation of a wrongdoer from other shareholders in reaching a determination on the basis of an applicant's/licensee's character qualifications. As will be demonstrated, the caselaw relied upon by the Bureau is not remotely comparable on the facts of this case. Moreover, the desired result sought by the Bureau -- the nonrenewal of Nasby's license -- based on its gross and purposeful misreliance on such caselaw flies in the face of direct Commission precedent which supports the grant of Nasby's applications herein.

4. There is no dispute that Root was adjudged guilty in various federal and state courts for which he was imprisoned. However, it is undisputed that Root resigned from all ownership positions with Nasby prior to his convictions. When this factor is

combined with other relevant factors, which include, *inter alia*, that Root had no involvement in the day-to-day management, operation or control of Nasby and Station WSWR, that Nasby principals were not involved in the operation of Thomas L. Root's law practice, including the conduct for which he was criminally punished, it is clear that the Bureau must compartmentalize its arguments and ignore record evidence in its quest to reach its desired result.

5. In *Sande Broadcasting Co., Inc.*, 61 F.C.C.2d 305 (1976), the Commission was faced with a renewal applicant whose application was challenged by a third party primarily on the basis of alleged deficiencies, *inter alia*, in the station's ascertainment, program service and EEO efforts.³ The pertinent facts are these: In seeking to reopen the record, the petitioner provided the Commission with evidence that a 35% shareholder of the licensee, who also had served as an officer and director, had been convicted on three counts of grand larceny, and three bad check charges, resulting in his receiving a sentence of zero to seven years in a state prison, from which the principal appealed. *Sande Broadcasting, supra*, 61 F.C.C.2d at 306. The petitioner also argued that the criminal activities and the principal's ownership in the station ran concurrently, that a loan from a separate company the principal owned 50% of and which was involved in the

³ Petitions to deny the station's renewal were denied by the Commission, however, the Commission granted Sande a short-term renewal due to perceived deficiencies in its EEO efforts. *Sande Broadcasting, supra*, 61 F.C.C.2d at 305.

criminal conduct financed the purchase and operation of the station, and that the other one-half owner of the separate company who remained a 35% shareholder of the licensee, was associated with the principal and the station during the same period of time. *Id.* The record further reflected that the 35% remaining shareholder was not active in the management and operation of the separate company where the misconduct took place, that he was unaware of any problems until the dishonored checks surfaced and that the former principal of Sande did not attend any Sande corporate meetings and was not involved in the station in any way following his indictment. Moreover, the remaining 35% shareholder was investigated by the state and federal authorities in connection with his ownership of the separate company and no indictment was ever sought. *Id.*, 61 F.C.C.2d at 307.

6. In reaching a determination that no evidentiary hearing was warranted nor the imposition of any further sanction, the full Commission took into account several factors. One, while it was undisputed that the licensee's ownership was intertwined with the separate company and that some of the licensee's initial financing had come from the separate entity, the petitioner failed to present and the record did not reflect any evidence that either entity was otherwise involved with the other's day-to-day operations. Indeed, the Commission found it *significant* that the petitioner failed to allege specific facts that showed the principal involved in the day-to-day operations of the radio station. *Sande Broadcasting, supra*, 61 F.C.C.2d at 308-09. Second, and in the Commission's

view, more important, the principal's acts did not involve broadcasting or any application before the Commission and the principal was removed from the corporation prior to his felony convictions. The Commission held that the principal's activities, by themselves, should not serve as a barrier to Sande's renewal application. *Id.* The same conclusions reached by the Commission in *Sande* -- finding the applicant before it qualified to be a Commission licensee notwithstanding former association with a principal with unrelated criminal convictions -- must also be reached here. As the record evidence reflects, Root was not involved in the day-to-day station operations of Nasby, nor was Nasby and any of its principals involved in any way with Root's law practice. Moreover, long prior to his federal convictions in January 1992 and state convictions thereafter, Root had ceased being an officer, director and shareholder of Nasby, as well as ceased serving as the station's legal counsel. Nor did Root attend or participate in any corporate meetings of Nasby subsequent to his resignations as an officer, director, and station legal counsel, and divestiture of his stock ownership. Root never informed the other Nasby principals of his activities which led to his convictions and there is no basis on which to impute those activities to Nasby and its principals where those activities occurred without their knowledge and/or control, in licensing proceedings and events surrounding those proceedings, which both the Bureau and Nasby agree did not involve Nasby and Station WSWR in any way. And while the Bureau may argue that the matters which

Root was found to have committed wrongdoing involve "broadcasting" or "applications before the agency" they **do not** involve broadcasting matters or applications related to Nasby in any way and independently do not support the denial of Nasby's license renewal.

7. In ignoring the *Sande* decision which has a direct bearing on the instant case, the Bureau continues to cling to and rely on Review Board decisions in *West Jersey Broadcasting Co.*, 90 F.C.C.2d 363, 371 (Rev. Bd. 1982) and *Marr Broadcasting Company, Inc.*, 2 FCC Rcd. 6596 (1987) (§ 7, p. 5). Neither case is remotely comparable to the facts of the instant case. In *West Jersey*, two of the corporation's three principals were found to have engaged in paying a settlement in excess of FCC legal limits at the time in order to obtain the very station whose license renewal was at issue. A third principal, whose conduct was not at issue relative to the illegal payoff, but whose conduct was the subject of equivocal testimony which the Board determined was not of such a level to form an independent basis for denying the license renewal, attempted to distance himself from the other principals in order to retain the license in his own right. In refusing to permit the third principal from seeking to succeed to the ownership of the station in his own right, following the licensee's failure to except to its disqualification based on the illegal payoff, the Review Board determined that the third principal's individual qualifications were not before the Commission for review. Under these circumstances the Board indicated that it would not atomize

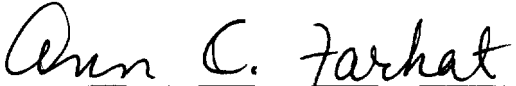
a licensee for adjudication on the discrete qualifications of an individual shareholder. *West Jersey, supra*, 90 FCC 2d at 371 (¶ 18).

8. *Marr* involved a comparative renewal challenge wherein all of the principals of the incumbent licensee were found by the Presiding Judge to have been involved in a "repeated and pervasive pattern of misrepresentation and lack of candor" involving misrepresentations made directly to the Commission in letter filings and applications directly affecting and involving the station. In denying the incumbent licensee's second proposed settlement wherein the incumbent licensee's principals proposed to individually own nonvoting stock in the new permittee, the Review Board held that construction permits could only be awarded to fully qualified applicants, which the individual principals were not due to their involvement with a corporation they individually owned which was disqualified as a Commission licensee based on their *individual* actions. *Marr, supra*, 2 FCC Rcd. at 6596-67.

For the foregoing reasons as well as the reasons set forth in *The Petroleum V. Nasby Corporation's Application for Review*, the record evidence and Commission precedent warrant the unconditional grant of Nasby's renewal application and transfer of control applications herein.

- 10 -

Respectfully submitted,


Ann C. Farhat

Bechtel & Cole Chartered
1901 L Street, N.W.
Suite 250
Washington, D.C. 20036
202/833-4190

Counsel for The Petroleum
V. Nasby Corporation

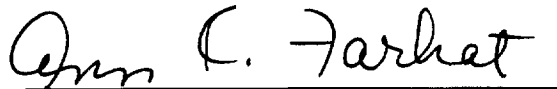
October 30, 1995

CERTIFICATE OF SERVICE

Ann C. Farhat, a member of the firm of Bechtel & Cole Chartered, certifies that on October 30, 1995, she caused copies of the foregoing *Opposition of The Petroleum V. Nasby Corporation* to be served by hand (or by U.S. first class mail, postage prepaid) on the following individuals:

John I. Riffer, Esquire (by hand)
Associate General Counsel -
Adjudication
Federal Communications Commission
1919 M Street, N.W., Room 610
Washington, D.C. 20554

James Shook, Esquire (by first class mail)
Hearing Branch
Mass Media Bureau
Federal Communications Commission
2025 M Street, N.W., Room 8210
Washington, D.C. 20554


Ann C. Farhat